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Employment Division v. Smith and State Free Exercise Protections: Should State Courts Feel Obligated to Apply the Federal Standard in Adjudicating Alleged Violations of Their State Free Exercise Clauses?

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ESSAY

EMPLOYMENT DIVISION V. SMITH AND STATE FREE EXERCISE PROTECTIONS: SHOULD STATE COURTS FEEL OBLIGATED TO APPLY THE FEDERAL STANDARD IN ADJUDICATING ALLEGED VIOLATIONS OF THEIR STATE FREE EXERCISE CLAUSES?

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In *Employment Division v. Smith*,[1] the Supreme Court dialed back the level of scrutiny it would apply to claims of violations of the Free Exercise Clause of the First Amendment of the United States Constitution. While not firmly establishing a total rule on all such claims,[2] the Court set forth that a valid and neutral law of general applicability is constitutional, even if it by incidence burdens a religious practice.[3] The response to this decision was immediate and strong: Congress

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1 494 U.S. 872 (1990).

2 While *Smith* articulated a test generally for claims of federal free exercise violations, there are exceptions to that test, including a "hybrid situation" involving free exercise claims coupled with other constitutional claims, such as freedom of speech or expression, which have generally garnered stricter review by the courts, as well as exceptions for "individualized governmental assessment[s][,]" especially in the unemployment context, usually where an exception for a religious purpose must be granted when an exception has been granted for a non-religious purpose. *See id.* at 882, 884. Additionally, it should be noted that any law that *directly targets* religion or religious practice should *always be examined under strict scrutiny review*, because to target religion will always require the government to show it has a compelling interest that justifies the law and the law is narrowly tailored to achieve that interest. *See id.* at 877.

3 *Id.* at 879.

passed the Religious Freedom Restoration Act (RFRA),[4] but the Court found the law largely unconstitutional in attempting to tell the Court what the law is by requiring *all* courts to apply strict scrutiny always to any claims that *state* or federal laws burdened sincere religious practices.[5] While the test set forth in *Smith* (with federally established limitations and exceptions) remains the proper test for violations of the Federal Constitution's Free Exercise Clause, state supreme courts should not feel bound by that rule when interpreting their own state's free exercise or worship provisions.

Rather, state courts should feel free to apply whatever test is most appropriate based on the textual provisions of their state constitution that protects the free exercise or worship of its citizens. Of course, such freedom to the state courts is greatly limited in many states by the passage of their own Religious Freedom Restoration Acts.[6] These acts generally set forth precisely how the courts must determine whether or not a law violates the free exercise or worship of a claimant.[7] Even if not limited by a RFRA—which would generally require strict scrutiny—a state court should apply strict scrutiny to violations of its state's free exercise clause if it is at minimum coextensive textually with the Federal Constitution. If, however, the state provision is *less* protective textually than the federal Free Exercise Clause, that is, if it suggests a greater ability of the State to interfere in religious practice, then the standard set forth in *Smith* should be applied.[8]

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4 *See* Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

5 *See City of Boerne*, 521 U.S. at 532–36 (finding that RFRA went beyond Congress's legitimate Section 5 powers arising from the Fourteenth Amendment, as the Act was not remedial in nature but rather was *substantively defining the limitations that Congress could place on the states*, a determination that within the separation of powers is legitimately left solely to the Court).

6 According to the National Conference of State Legislatures, at least twenty-one states, including Kansas, Indiana, and Texas, have enacted RFRAs since 1993 and the subsequent *Boerne* decision a few years later. *See* STATE RELIGIOUS FREEDOM RESTORATION ACTS, NAT'L CONFERENCE STATE LEGISLATURES (May 4, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

7 *See, e.g.*, KAN. STAT. ANN. § 60-5303(a) (2016) (providing that a "[g]overnment shall not substantially burden a person's civil right to exercise of religion even if the burden results from a rule of general applicability, unless such government demonstrates, by clear and convincing evidence, that application of the burden to the person: (1) Is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest"); TEX. CIV. PRAC. & REM. CODE ANN. § 110.003(a), (b) (West 1999) (setting forth the requirement that government cannot substantially burden free exercise of religion unless the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that interest"). Both of these RFRA provisions more-or-less codify a strict scrutiny test for courts in determining whether there has been a governmental violation of the free exercise right.

8 *See infra* note 12.

I. LOOKING TO THE TEXT AND ORIGINAL INTENT OF STATE FREE EXERCISE CLAUSES

Before determining what level of scrutiny should be applied to claims of violations of a state free exercise clause, the text of the clause should be considered, as well as the original intent behind the clause at the time of its addition to the state constitution. This is necessary to determine how coextensive the state constitutional clause is with the Federal Constitution.[9] If in both intent and textual language the state clause is largely coextensive with the federal clause, the state court should be more willing to adopt the more government-friendly test put forth in *Smith*; if the state clause is less coextensive with the Federal Constitution, the state court should feel free to interpret the clause much more restrictively—providing greater protection to the individual right to freely exercise one's religion. Of course, state courts need not be bound to a more rigorous test than that required federally, but this Essay contends that the importance of the individual right—especially when evinced by a clearer protection in a state constitution—*should* weigh heavily when a court is deciding what standard to apply when violations of free exercise are claimed.

Take, for instance, the free exercise clause language contained within the Kansas Bill of Rights:

> The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship; nor shall any control of or interference with the rights of conscience be permitted, nor any preference be given by law to any religious establishment or mode of worship.[10]

As the Kansas Supreme Court has noted, this language is much more detailed than that in the Federal Constitution: "[T]he wording of this section of [the Kansas] Bill of Rights is much more in detail respecting religious freedom than is the First Amendment to the Federal Constitution."[11] Such a determination of greater detail in the language[12] protecting the right speaks to a *stronger* protection

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9 *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the *free exercise* thereof . . . ." (emphasis added)).

10 KAN. CONST. Bill of Rights, § 7.

11 State v. Smith, 127 P.2d 518, 522 (Kan. 1942).

12 *See, e.g.*, MINN. CONST. art I, § 16 ("The right of every man to worship God according to the dictates of his own conscience *shall never be infringed* . . . nor shall *any control of or interference with the rights of conscience be permitted* . . . ." (emphasis added)); TEX. CONST. art. 1, § 6 ("All men have a natural and indefeasible right to worship Almighty God *according to the dictates of their own consciences*. . . . No human authority ought, *in any case whatever*, to *control or interfere with the rights of conscience in matters of religion* . . . ." (emphasis added)). Of course, not all state constitutional texts appear to provide any greater free exercise protection than the Federal Constitution. See *supra* note 9 for the federal constitutional language. The Virginia Constitution, for example, provides that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience." VA. CONST. art. 1, § 16. Nothing about this text inherently suggests any more protection than that contained in the Federal Constitution. Other state constitutions even, perhaps, suggest less protection than the Federal Constitution, though of course the Federal Constitution sets a floor for protection of the right which must be maintained no matter the state constitutional language. The California Constitution's free

of the individual right, which thus should be reflected in greater protection via the amount of scrutiny the state court should apply in determining whether or not there has been a violation of the individual's right of free exercise.

The Kansas courts have agreed with this determination—that the more detailed language provided in the Kansas Bill of Rights should equate to a test of strict scrutiny in determining whether or not a law is valid as against the individual right to freely exercise religion. In *State v. Evans*, the Kansas Court of Appeals found that "[t]he Kansas Constitution contains a strong prohibition against religious coercion. . . . '[O]nly those interests of the highest order' ought to override the free exercise of religion."[13] In *Stinemetz v. Kansas Health Policy Authority*, the appellate court noted that the Kansas Supreme Court had found there must be "a compelling state interest to justify imposition of terms that violate [an individual's] constitutional rights."[14] That determination of a strict scrutiny standard in *Evans*, it should be noted, came after the U.S. Supreme Court's decision in *Employment Division v. Smith*, so the Kansas court was certainly aware of the more permissive standard the Supreme Court had set forth—and rejected it.[15]

Not only have the Kansas courts found the language of the state free exercise clause to be more protective than that of the Federal Constitution, they have also determined that the Kansas Constitution's history and original intent speak to such greater protection as well. However, in making such a determination, the appellate court in *Stinemetz* looked to the *Ohio* Constitution and that state's interpretations of its free exercise protections.[16] The court looked to Ohio's interpretations of its free exercise clause because the two clauses are very similar,[17] a similarity that arises not from mere coincidence but as a purposeful result of the way Kansas's

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exercise clause provides that "[f]ree exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State." CAL. CONST. art 1, § 4. The written text here suggests that laws can certainly be passed that limit the freedom of conscience that other constitutions protect more strongly; so long as the law limits "liberty of conscience" that affects the peace and safety of the State (language that allows for a broad interpretation of a state interest in passage of a law limiting that religious liberty), it is acceptable for the State to constrain the individual right. *But see* Catholic Charities v. Superior Court, 85 P.3d 67, 89–91 (Cal. 2004) (examining a claimed violation of free exercise under the California Constitution using a strict scrutiny standard of review, but noting that there was no controlling state supreme court determination of the proper standard and this case need not be used to set the standard because here the law passed strict scrutiny so any other less restrictive standard would also be met).

13 796 P.2d 178, 180 (Kan. Ct. App. 1990) (quoting Wright v. Raines, 571 P.2d 26, 32 (Kan. Ct. App. 1977)).

14 252 P.3d 141, 157 (Kan. Ct. App. 2011) (citing State v. Bennett, 200 P.3d 455, 459 (Kan. 2009)).

15 *Employment Division v. Smith*, 494 U.S. 872, 872 (1990), was decided on April 17, 1990, while *State v. Evans*, 796 P.2d at 178, was decided on August 3, 1990.

16 *See Stinemetz*, 252 P.3d at 157–58.

17 *See* OHIO CONST. art. I, § 7 ("All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted.").

Bill of Rights was adopted. When a Kansas constitutional convention met in 1859, its members voted to make "the Ohio Constitution the basis for the Kansas Constitution."[18] Since Kansas cases interpreting its free exercise clause were limited, especially post-*Employment Division v. Smith*, the court in *Stinemetz* turned to the Supreme Court of Ohio's interpretations of Ohio's free exercise clause to further support the use of a strict scrutiny standard in such cases involving claims of a violation of an individual's right to free exercise of religion.[19]

In examining its free exercise clause as compared to that of the Federal Constitution, the Ohio Supreme Court found that the language contained within it provided "broader" protection than that of the Federal Constitution.[20] The court noted, however, that the "more detailed" language regarding the right did "not by itself prove that Ohio's framers created a broader freedom of religion" than that contained in the Federal Constitution.[21] Despite this, the "words of the Ohio framers *do indicate their intent to make an independent statement on the meaning and extent of the freedom*."[22] While not sufficient in and of itself to create a broader right to freedom of religion, the Ohio language, the court found, distinguished itself from that of the Federal Constitution in a way that was "qualitative[ly] differen[t]."[23] Most especially, the court stated that the Ohio Constitution's prohibition on any law that would "interfer[e] with the rights of conscience"[24] showed the framers intended to be more protective than the Federal Constitution's limitation on "any law *prohibiting* free exercise of religion."[25] Thus, when looking to the Supreme Court's decision in *Employment Division v. Smith*, the Ohio court simply noted that the rule set forth in that case showed where there is a "divergence of federal and Ohio protection of religious freedom."[26] Thus the court rejected the much less protective standard and rather relied on the test that had been regularly set forth in Ohio for claims of violations of its free exercise clause, a test requiring "that the state enactment [inhibiting freedom of religion] must serve a compelling state interest and must be the least restrictive means of furthering that interest."[27]

When a state constitution's language clearly espouses a stronger protection of individual freedom to exercise religion and there is no legislation guiding the

18 *Stinemetz*, 252 P.3d at 158 (citing the KANSAS CONSTITUTIONAL CONVENTION 676–677 (1920)) (noting that except for two sections, the Kansas Constitution's Bill of Rights is "modeled, section by section, upon the Ohio Constitution").

19 *Id.*

20 Humphrey v. Lane, 728 N.E.2d 1039, 1043–44 (Ohio 2000).

21 *Id.*

22 *Id.* at 1044 (emphasis added) (footnote omitted).

23 *Id.*

24 *Id.* (quoting OHIO CONST. art. I, § 7)

25 *Id.* (emphasis added); *see also supra* note 12 (discussing similar language in other state constitutions suggesting textually a stronger protection of individual's right to free exercise of religion).

26 *Humphrey*, 728 N.E.2d at 1044.

27 *Id.* at 1045.

proper interpretational framework (that is, a RFRA mandating a standard[28]), a state court generally should adopt a more restrictive test than the federal standard set forth in *Employment Division v. Smith*. An exception, however, should be made if the original intent of the framers of that constitutional right does not comport with the language adopted (that is, there is clear intent that the language, while seemingly broader than the Federal Constitution, was not meant to create a broader protection) or where there is a clear intent by the framers to provide protection that was equivalent to (that is coextensive with and no broader) that provided by the Federal Constitution.

II. STRICT SCRUTINY FOR FREE EXERCISE CLAIMS

This Essay proposes that the strict scrutiny test that should be adopted by states diverging from the federal standard is that set forth by the Minnesota Court of Appeals in *Shagalow v. State Department of Human Services*[29]:

> To determine whether government action violates an individual's right to religious freedom we ask: (1) whether the belief is sincerely held; (2) whether the state action burdens the exercise of religious beliefs; (3) whether the state interest is overriding or compelling; and (4) whether the state uses the least restrictive means.[30]

While the test itself seems straightforward, its components do not comport with simple adjudication, with each providing a variety of issues in determining whether or not the State has actually violated the individual right to free exercise of religion.

A. The Sincerity of Belief

It is the first element of the strict scrutiny test that perhaps may give the most pause when courts are stepping into the determination of whether an individual's right to free exercise of his religion has been violated. At first glance, a court questioning the sincerity of an individual's religious belief appears to come quite close to a court deciding whether or not a religious belief is valid or not—a clearly troubling thought and one which would come strikingly near to invoking an Establishment Clause violation. However, in reality, courts are well-equipped to handle the question of determining the *sincerity* of a religious belief, because such a question does not question the belief itself, but simply whether or not the person asserting the belief actually holds it. It is a *factual* question which the courts certainly have the authority—and ability—to examine.

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28 It must be noted, however, that while the Kansas courts' interpretations here are suggestive of how state courts should approach the issue when there is no RFRA present to guide interpretation of free exercise clauses, the interpretations no longer affect Kansas courts because Kansas's RFRA was passed in 2013 and now statutorily provides for the interpretation of claimed free exercise violations. For the language of the Kansas RFRA, see *supra* note 7.

29 725 N.W.2d 380 (Minn. Ct. App. 2006).

30 *Id.* at 390.

Courts have demonstrated time and again that they are "able to ferret out insincere religious claims."[31] Such a determination may not be particularly difficult—after all, courts are consistently relied upon to determine whether or not behavior is fraudulent, whether dealing with religion or otherwise. For example, if a person claims that wearing a hat is violative of her religious beliefs, the sincerity of that belief can be determined via a factual investigation. First, the claimant herself can explain what the belief is, why she holds it, and how she practices it. Then, evidence should be allowed in to show whether or not the claimant *actually* practices what she claims. In this instance, if there is evidence showing that the claimant regularly wears a hat, this would act against the claimed sincerity of the belief. Of course, such evidence may not be *entirely* conclusive as to the sincerity of the belief. Because of this, the court should enter into this investigation of sincerity with an assumption of sincerity attached to the claimant. This practice should be adopted because of the sensitive nature of such a claim—a religious belief and resultant religious practice should not be presumed false as such a presumption would work to suggest too much distrust of religious belief by the courts.

The requirement of sincerity of belief did not arise in state courts; rather, its beginnings are from cases involving conscientious objectors to conscription.[32] Because of the sincerity requirement, courts and draft boards, in determining whether or not someone should be exempt from conscription by reasons of conscience, were forced to "conduct rigorous factual inquiries into religious claims."[33] Resultantly, the court would look to sincerity of belief as the "ultimate question" in these cases.[34] It is not the "truth" of a belief that is questioned by the courts; rather, it is whether the belief is truly held. That, the Court noted in *United States v. Seeger*, "is, of course, *a question of fact*."[35] Courts are well equipped to make this determination—they are able to observe the witness and his behavior during direct and cross-examinations, and the government, as well as the court, can press for answers to inconsistencies that suggest a lack of sincerity. While there may be limitations to this, especially in regard to very unusual beliefs that may seem impossible to be sincerely held, in general courts should be trusted to be able to determine whether a belief is sincerely held or not.

In *Stinemetz*, the Kansas Court of Appeals found that the record supported the claimant's claim of her religious belief that led to her refusing a liver operation that would require a blood transfusion.[36] The district court had "expressly found that Stinemetz's request for a bloodless liver transplant was based on her *sincere and deeply held religious belief*."[37] Stinemetz had shown the sincerity of her belief through lengthy testimony asserting that "she had been a Jehovah's Witness for over [thirty-five] years . . . . [and] quot[ing] numerous passages from the Bible on

31 Ben Adams & Cynthia Barmore, Essay, *Questioning Sincerity: The Role of the Courts After* Hobby Lobby, 67 STAN. L. REV. ONLINE 59, 59 (2014).

32 *Id.* at 60.

33 *Id.*

34 Witmer v. United States, 348 U.S. 375, 381 (1955).

35 380 U.S. 163, 185 (1965) (emphasis added).

36 Stinemetz v. Kan. Health Pol'y Auth., 252 P.3d 141, 160 (Kan. Ct. App. 2011).

37 *Id.* (emphasis added).

which she based her belief that blood transfusions are prohibited."[38] While in *Stinemetz* the court stated the burden was on the claimant to prove sincerity,[39] this Essay contends, for the reasons stated above, that it should be to the government to disprove a presumption of sincerity.

In addition to evidence that directly shows or disproves the existence and practice of a strongly held religious belief, courts should also look to "any secular self-interest that might motivate an insincere claim."[40] While again not entirely determinative of sincerity, such an inquiry is especially helpful when the belief appears only to have arisen when it had become clear that there would be a substantial benefit of making a claim of such a belief. For example, a desire to continue smoking peyote and avoiding prison clearly would be secular motives to claim a religious belief that would justify the smoking of an otherwise generally illegal drug. Again, courts are quite capable of determining the sincerity of such claims and weighing the other motivations against the claimed sincerity of the belief.

While seemingly contentious, questions of sincere belief are merely questions of fact, questions which courts and judges are more than able to handle and which in innumerable situations we have *entrusted* them to handle.[41]

B. The Governmental Burden on Free Exercise

What is a substantial burden on the free exercise of religion? That is a question that courts have struggled with and to which there is still no clear or uniform answer. However, courts—both federal and state—have at least provided some guidance on the matter, as have some legislatures.

Sometimes a substantial burden is clear—at least to the examining court. For example, in *Humphrey v. Lane*, the Ohio Supreme Court had no trouble determining that a grooming policy requiring collar-length hair for men placed a substantial burden on the claimant's religious belief that a man's hair "should not be cut unless he is in mourning."[42] Noting that the burden of proving the governmental burden fell on the claimant, the court simply stated that requiring the claimant to cut his hair "would certainly infringe upon the free exercise of his religion."[43] That determination of certain infringement—with utterly no additional explanation—was sufficient to establish there existed enough of a governmental burden to require the government to show a compelling interest supporting the law,

38 *Id.*

39 *Id.*

40 Adams & Barmore, *supra* note 31, at 62 (citing Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 441 (2d Cir. 1981)).

41 It would seem, as well, that oftentimes the government-defendant will not contest the sincerity of the belief for much of the same reasons that there is a trepidation in regard to courts answering the sincerity question themselves—the government simply is fearful of getting too caught up in religion. *See, e.g.*, Shagalow v. Dep't of Human Servs., 725 N.W.2d 380, 390 (Minn. Ct. App. 2006) (noting the sincerity of the claimant's religious belief was not disputed).

42 728 N.E.2d 1039, 1045 (Ohio 2000).

43 *Id.*

which also must be the "least restrictive means available of furthering that state interest."[44]

This approach should be taken when it is clear the governmental law directly restricts the claimant's freedom of religion. When a government's directive affects the ability of the claimant to freely practice his sincerely held religious belief, then the directive is a substantial burden on the right to free exercise of religion. While this would allow virtually any direct effect on a religious practice to be considered a substantial burden, that allowance should not be considered overly worrisome—while this may make it rather simple for the claimant to show a governmental burden, the government will still have the opportunity to show it has a compelling interest in its burdensome law and that the law is the least restrictive means to achieving that interest. Certainly making it slightly easier to find a substantial burden when there is a direct effect on religious practice does not too greatly enhance a claimant's ability to succeed on a free exercise violation claim.

Even when the substantial burden is clear, some state legislatures have attempted to make the determination even more straightforward through their RFRAs. However, such attempts do not always seem to be that helpful. For example, Kansas in its RFRA defines the word "burden" but does not provide a definition for "substantially,"[45] even though the RFRA states a violation of free exercise occurs when the government "substantially burden[s]" the religious practice.[46] The definition given for "burden" does not provide much guidance on the subject, simply stating that a burden

> means any government action that directly or indirectly constrains, inhibits, curtails or denies the exercise of religion by any person or compels any action contrary to a person's exercise of religion, and includes, but is not limited to, withholding benefits, assessing criminal, civil or administrative penalties, or exclusion from government programs or access to government facilities.[47]

While asserting that a burden can be direct or indirect, this definition provides little else to aid a court in a determination of a *substantial* burden. Logically, under this Kansas law, a court would be able to freely interpret what "substantial" means and the substantiality requirement would suggest that a law would only be impermissible if, directly or indirectly, it *substantially* "constrains, inhibits, curtails[,] or denies the exercise of religion by any person."[48] However, how substantiality factors into the equation becomes less clear when the latter part of the definition of "burden" is looked to—a compelling of "any action contrary to a person's exercise of religion."[49] Because compelled action contrary to a person's religious belief or practice is a very strong governmental requirement, this Essay

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44 *Id.*

45 *See* KAN. STAT. ANN. § 60-5302(a) (2016).

46 *See id.* § 60-5303(a). Other state RFRAs, however, do not provide any definitional guidance in regard to "substantial burden." *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 110.001 (West 1999).

47 KAN. STAT. ANN. § 60-5302(a).

48 *Id.*

49 *Id.*

contends that in such instances the governmental action is inherently substantially burdensome on free exercise.[50]

What is most important, however, in determination of a substantial burden by the government on free exercise, is an examination of "the degree to which a person's religious conduct is curtailed and the resulting impact on his religious expression."[51] A court should not look to what a religion requires its believers to do or whether the religious belief or practice asserted by the claimant is a central part of the religion—these questions invite the court to step on the toes of religion and religious belief and become too entangled in questions which are not the types of questions courts should be answering.[52] By limiting its inquiry to how the government is affecting conduct and religious expression, a court is able to avoid a greater intertwining of law and religion.

In short, this Essay proposes an adoption of the inquiry suggested by the Texas Supreme Court in *Barr v. City of Sinton*—"[a] person's religious exercise has been substantially burdened . . . when his ability to express adherence to his faith through a particular religiously-motivated act has been meaningfully curtailed or he has otherwise been truly pressured significantly to modify his conduct."[53] Inherently, this requires looking at the burden from the perspective of the claimant, and thus a bright-line rule cannot be made.[54] Rather, the inquiry will always be fact-intensive and on a case-by-case basis. State courts have found such substantial burdens existed when a zoning restriction required the claimant to locate his halfway house ministry outside city limits,[55] when a state traffic law required slow-moving vehicles to display a fluorescent sign, forcing Amish claimants to choose between criminal sanctions and violating their own religious beliefs,[56] and when a state health authority refused to grant the claimant's request for a bloodless transfusion, forcing her to decide between violating her religious belief or not getting a life-saving surgery.[57] Oftentimes when a government action forces an individual to choose between sanctions and violating his religious belief, courts have found there exists a substantial burden on free exercise.[58] This Essay agrees with that assessment.

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50 In fact, this would be the same as the reasoning set forth by the Supreme Court of Ohio in *Humphrey v. Lane* (the law there would have compelled the claimant to cut his hair, an action directly contrary to the exercise of his religion); it is only distinguished here because of the Kansas legislature's decision to define what a "burden" is while failing to define its own "substantial" requirement to show a free exercise violation.

51 Barr v. City of Sinton, 295 S.W.3d 287, 301 (Tex. 2009).

52 *See id.*

53 *Id.* at 302 (quoting Brief of the American Center for Law and Justice, the American Civil Liberties Union Foundation of Texas, Senator David Sibley, and Representative Scott Hochberg as Amici Curiae Supporting Petitioners at 3, *Barr*, 295 S.W. 3d 287 (No. 06-0074)).

54 *See id.* at 301.

55 *Id.* at 302.

56 State v. Hershberger, 444 N.W.2d 282, 284 (Minn. 1989); *see also* Murphy v. Murphy, 574 N.W.2d 77, 81 (Minn. Ct. App. 1998) (requiring a father to get a secular job against his religious beliefs in order to pay child support was a substantial burden on free exercise).

57 Stinemetz v. Kan. Health Pol'y Auth., 252 P.3d 141, 160 (Kan. Ct. App. 2011).

58 *See, e.g.*, *id.* (The Kansas Health Policy Authority asserted that it had not substantially burdened Stinemetz's free exercise because there was "no evidence that [its] decision . . . caused

While it is impossible for the law to be black-and-white in regard to the substantial burden element of showing a violation of free exercise, courts should focus on the law or regulation's effect on an individual's conduct and the exercise of a religious practice or belief. It is not to the court to question the centrality or necessity of the religious belief—that would be a dangerous intermingling of religion and law. When a law compels actions directly contrary to a religious practice or when it forces a choice between punishment and violation of belief, then a substantial burden exists on the free exercise of the individual's religion.

C. The Compelling Government Interest and the Narrow Tailoring to Achieve That Interest

Once it has been shown by the claimant that there does exist a substantial burden on free exercise, the government can overcome that burden by showing there exists a compelling or overriding government interest undergirding the law or regulation that is burdening free exercise. However, even if there does exist such an interest, the government must also show that the law or regulation has been narrowly tailored or uses the least restrictive means to achieve that compelling governmental interest. While this is a heavy burden on the government, this Essay contends such a weight on the government is appropriate: if a state's constitution has shown that strict scrutiny should be applied when free exercise has been potentially violated, then that scrutiny should be exactly that—*strict*.

Of course, again, the question of what exactly is a compelling government interest is one without a definitive answer. This Essay proposes that the question is of a legal nature and not factual. The court in *Shagalow*, for instance, listed a variety of government interests that were compelling: maintaining safety on public roadways, assuring parents provide sufficient primary support to their children, and maintaining the "peace and safety of labor relations."[59] In addition, the court there added that in the case before it, "protecting mentally or physically vulnerable persons" was as important and compelling as those other interests already found to be compelling by the highest Minnesota court.[60] In *Humphrey v. Lane*, the Ohio Supreme Court suggested that a compelling government interest exists when the law or regulation is related to "a central role of government, an area it is uniquely suited for."[61] In that case, the court found a compelling government interest was driving the regulation on haircuts for prison guards, because a uniform grooming policy fostered the appearance of an "organized, disciplined front" that could help

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an infringement on Jehovah's Witnesses as a church or on [the claimant's] practice or understanding of her religion." The court rejected this characterization of a substantial burden, finding instead that the conditioning of receiving authorization for a life-saving liver transplant surgery on violating the claimant's religious belief was a "heavy burden on her free exercise of religion.").

59 Shagalow v. Dep't of Human Servs., 725 N.W.2d 380, 391 (Minn. Ct. App. 2006) (quoting Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857, 866–67 (Minn. 1992)).

60 *Id.*

61 728 N.E.2d 1039, 1045 (Ohio 2000).

"squelch[] thoughts of organized unrest by prisoners."[62] Additionally, some states have provided definitions of "compelling government interest" in their RFRA statutes. Kansas, for example, provides a very limited definition that a "'[c]ompelling governmental interest' includes, but is not limited to, protecting the welfare of a child from abuse and neglect as defined by state law."[63] Obviously, courts would not be limited to finding only protection of child welfare as constituting a compelling interest.[64] Rather, this Essay suggests that courts should find a compelling government interest when the law is driven by a traditional governmental function. For example, a law banning possession of poisonous snakes could be seen as burdensome on certain factions that practice snake handling as an important part of their religion. Clearly such a law would be burdensome on the legitimate free exercise of the religion: either break the law and face sanctions or not practice that part of one's religion. However, any court would also find that the law was driven by a compelling government interest: governments traditionally have a strong interest in the welfare of their citizens; therefore, in passing such a law, the state was driven by a compelling interest of protecting its citizens.[65] It is in determining whether or not the law is the least restrictive means of achieving that interest that courts face more interpretive difficulties.

Just as the Kansas RFRA does not define what "substantial" meant in regard to a burden, it does not provide a definition of what constitutes "least restrictive means."[66] Thus, in Kansas, the courts have more freedom in making that determination than they do in determining what a "burden" is or what a "compelling interest" is because they are less bound by text than they are in regard to those requirements. However, this Essay proposes that unlike the "compelling interest" which is a legal question, the determination of whether or not the least restrictive means have been used to achieve that interest should be fact-bound. In *Humphrey v. Lane*, the court found that the regulation requiring cutting hair to

62 *Id.*

63 KAN. STAT. ANN. § 60-5302 (2016). Additionally, the statute later states that a compelling government interest that can justify a law burdening free exercise must be "of the highest order." *See id.* § 60-5304; *see also* Barr v. City of Sinton, 295 S.W.3d 287, 306 (Tex. 2009) (noting that a government's interest is compelling when it "justifies the substantial burden on religious exercise," a justification that can only arise when the "'interests [are] of the highest order'" because "religious exercise is a fundamental right") (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).

64 In *Stinemetz*, the court found that the government could show no compelling interest as to why it denied the bloodless transfusion to the claimant. Stinemetz v. Kan. Health Pol'y Auth., 252 P.3d 141, 160 (Kan. Ct. App. 2011). However, the court seemed to suggest that if cost were an issue—that is, if granting such a transfusion would be prohibitively expensive—the state may have been able to show a compelling government interest in judicious spending of taxpayer dollars. *See id.* at 160–61. However, the state failed to show any such interest in the case. *Id.* at 161.

65 Additionally, in such a hypothetical, a state would be able to show an even stronger compelling interest when children may be put at risk without the law; here, parents who practice the religion may expose their children to poisonous snakes, and the state most assuredly has a *very* strong interest in protecting the welfare of its youngest and most vulnerable citizens.

66 *See* KAN. STAT. ANN. § 60-5302 (2016).

collar-length was *not* the least-restrictive means available.[67] Rather, the court found that a simple accommodation could be made for Humphrey within the regulation: allow him to tuck his hair under a cap so that it did not appear long to prisoners.[68] The court noted, however, that in another case involving similar—but not identical—facts, a simple accommodation could not be made. In that case, *Blanken v. Ohio Department of Rehabilitation & Correction*, a prison guard's religious beliefs did not allow him to cut the hairs at the base of his neck.[69] Unlike in *Humphrey*, where the hair could be tucked under a cap, these hairs could not be hidden—therefore, the compelling government interest in achieving uniformity overrode the religious practice, and since no accommodation could be made to achieve uniformity, the regulation stood, thus requiring the claimant to either cut the hairs or lose his job.[70] In *Humphrey*, though, the Ohio Supreme Court found that because the government's goal could be achieved through the less restrictive means of the tucking-under-the-cap accommodation, the hair regulation was violative of free exercise and the Ohio Department of Rehabilitation and Corrections was enjoined from enforcing it.[71]

Other courts, however, have taken a less factually-centered approach to the question of least restrictive means. In *Shagalow*, the court determined that it should not make the decision of whether or not the practice undertaken by the Minnesota Department of Human Services (DHS) was the least restrictive means to achieve its goal of protecting mentally or physically vulnerable persons.[72] Rather, it found that the DHS was in "the best position to determine the least restrictive means by which to effectively achieve its goal" and thus should be afforded significant deference.[73] This Essay rejects such an approach. The courts should determine whether or not a practice is the least restrictive means to achieve a compelling government interest and not simply defer to the maker of the law or regulation. Courts may make this determination through expert testimony offered by both sides of the argument and reach a conclusion based on the facts offered by those experts. Certainly a government agency or legislature would always suggest that the policy decision it has made is the least restrictive way to achieve its goal. By granting broad deference in such cases, courts would be granting too much leeway to the government and would not be acting as proper safeguards against intrusions into the individual rights of the state's citizens.

In determining whether a governmental interest is compelling, a court must look to whether the interest is furthering some traditional governmental function of importance. While asking the court to determine a "traditional government

67 728 N.E.2d 1039, 1046 (Ohio 2000).

68 *Id.*

69 944 F. Supp. 1359, 1361 (S.D. Ohio 1996).

70 *Id.* at 1370.

71 *Humphrey*, 728 N.E.2d at 1047.

72 *See* Shagalow v. Dep't of Human Servs., 725 N.W.2d 380, 391–92 (Minn. Ct. App. 2006).

73 *Id.*

function" may be somewhat troublesome,[74] in cases involving the fundamental rights of individual citizens of a state, this Essay proposes courts should be relied on to make that determination. This is especially true in the context presented here—state courts interpreting state constitutional provisions in regard to alleged violations of protections in that constitution by state actors. The courts are knowledgeable regarding state law and the functions of the state government; they should be trusted in these situations. By granting them the authority to determine that legal question of what is compelling, state courts will be guardians of religious freedom against governmental restrictions on that liberty. And even if the courts tend to see more often than not that a government interest is compelling, they still are limited by the fact-bound question of whether or not that interest is achieved by the least restrictive means. By structuring the inquiries in this manner, individual rights are strongly protected while still allowing the government ample opportunity to achieve its goals.

CONCLUSION

Free exercise of one's religious beliefs and practices is a fundamental right enshrined in the Federal Constitution and in state constitutional provisions. While that right has received minimal protection federally following *Employment Division v. Smith*, it should receive greater protection in the states. Many states have achieved that protection through the passage of their own Religious Freedom Restoration Acts. However, when RFRAs are not present to protect that right, it is to the courts to provide security for religious freedom. In states without a guiding RFRA, courts should approach claims of violations of religious free exercise in this way:

A. Is the law targeting religion? If yes, strict scrutiny must always be applied. If not (that is, the law is neutral and generally applicable) move to B.

B. Look to the text and intent of the state constitutional provision creating the right: Is the text and/or intent coextensive with the federal Free Exercise Clause in the First Amendment?

> 1. If yes, a court should, at minimum, apply the federal standard set forth in *Employment Division v. Smith* (as well as its exceptions and variations in regard to individualized exceptions, etc.). However, this Essay contends that courts may (and *should*) apply a strict scrutiny standard even when the provision is merely coextensive with the First Amendment's protective language and intent.

74 *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985) (suggesting courts should not be involved in determining traditional government functions as they are ever-changing and dependent on political structures at the time).

2. If the provision is not coextensive with the federal Free Exercise Clause and is rather *less* protective in text or intent, then only the federal *Smith* standard should be applied.

3. If the provision is not coextensive with the federal Free Exercise Clause and is rather *more* protective in text or intent, then strict scrutiny should be applied.

C. If strict scrutiny is being applied, it should be a step-by-step analysis as follows:

1. Is the religious belief sincere? A presumption of sincerity should attach to the claimant's belief. That sincerity can be disproven through factual evidence showing the claimant's failure to actually practice the belief or through evidence showing secular motivation to lie about the belief's sincere existence for the claimant. This is a factual question. If the belief is not sincere then there has been no violation of free exercise. If the belief is sincere, move to element 2.

2. Has the government substantially burdened the religious expression/belief/practice? This question must be examined from the view of the claimant; generally, a substantial burden will exist when the religious conduct has been altered by the government's law or regulation, or when the law or regulation creates a sort of catch-22 for the claimant: either violate his religious belief by following the law or face sanctions by not violating his religious belief and by not following the law. This is much more a factual question than a legal one and the claimant must prove the burden exists. If a substantial burden does not exist, then there has been no violation of free exercise. If a substantial burden *does* exist, move to element 3.

3. Does there exist a compelling governmental interest justifying the substantial burden on religion? This is a *legal* question that courts should determine by looking at the underlying policy or reason for the law or regulation. If what undergirds the law is the result of a traditional governmental function, then there likely exists a compelling governmental interest in the law. The burden of proof for this element is on the government. If the law is not supported by a traditional government function, then a compelling interest does not exist and therefore the law is violative of free exercise. If a compelling governmental interest *does* exist, move to element 4.

4. Is the law or regulation burdening religion the least restrictive means by which to achieve the underlying compelling government interest? This is a *factual* question that courts should determine through expert testimony from both parties. The government must prove this element. If experts show a less restrictive method could have been

> undertaken by the government to achieve the compelling interest, then the law violates free exercise. If, however, it can be shown that there were no practical less restrictive alternative methods for achievement of the interest, the law does not violate free exercise.

While the Supreme Court in *Employment Division v. Smith* walked back protections of religious freedom, state legislatures and courts have stepped up to act as new safeguards of that sacred liberty. Though it can often be troublesome to have courts stepping in where religion is concerned, the fundamentality of such a right necessitates that they do. Courts can and should be trusted to protect fundamental rights, and if claimed free exercise violations are approached in the manner suggested by this Essay, then courts can steer clear of becoming too entangled in religious questions. By preventing their inquiries from delving into religious doctrine and rather focusing them on factual questions of sincerity, burdens, and government functions, courts are able to fairly adjudicate these claims without fear of Establishment Clause issues. While the federal courts have faltered in their protection, state courts need not feel inclined to weaken themselves in the same way. It is not to the government to broadly dictate or limit how a religion should be practiced. No, "[t]he Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate."[75]

75 James Madison, Memorial and Remonstrance Against Religious Assessments (June 20, 1785), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 82 (Philip B. Kurland & Ralph Lerner eds. 1987).